Office-Supreme Court, U.S.
FILED
NOV 17 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 749

SUN OIL COMPANY, *Petitioner*

v.

FEDERAL TRADE COMMISSION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

LEONARD J. EMMERGLICK
1021 Tower Building
Washington, D. C.
Attorney for Petitioner

Of Counsel:

HENRY A. FRYE
SAMUEL K. WHITE
RICHARD L. FREEMAN
Fidelity-Philadelphia
Trust Building
Philadelphia, Pa.

PEPPER, HAMILTON & SCHEETZ
Fidelity-Philadelphia
Trust Building
Philadelphia, Pa.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTE INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE WRIT	14
1. The Court of Appeals erred in holding that Sun's use of a non-coercive consignment program of the dimensions involved here constitutes an illegal price fixing device under the Federal Trade Commission Act	14
2. The questions presented in this case are of substantial and continuing importance	19
3. The questions presented by this case are of special importance to the structure of the retail gasoline industry	21
4. The petitioner structured its agency system upon the well established authority of this Court's decision in *United States* v. *General Electric Co.*, 272 U.S. 476 (1926). Basic considerations of fairness and equity make it appropriate for this Court to review the retrospective application of *Simpson* to support an order in perpetuity broader in its prohibitions than consignment	21
CONCLUSION	23
APPENDIX	1a

TABLE OF AUTHORITIES

CASES: Page

C.B.S. Business Equipment Corp. v. *Underwood Corp.*, 1964 CCH Trade Cases Para. 71,341 (S.D.N.Y.) 144 U.S.P.Q. 302 20

Guidry v. *Continental Oil Co.*, No. 21543 5th Cir. July 2, 1965. 1965 CCH Trade Cas. Para. 71,495 21

Interstate Circuit, Inc. v. *United States*, 306 U.S. 208.. 18

Lyons v. *Westinghouse Electric Corp.*, 235 F.Supp. 526 (S.D.N.Y. 1964) 21

Simpson v. *Union Oil Co. of California*, 377 U.S. 13 (1964) 2, 13, 14, 19

Snap-on-Tools v. *Federal Trade Commission*, 321 F.2d 825, 829 (C.A.7) 20

Sun Oil Co. v. *Federal Trade Commission*, 371 U.S. 505 ..... 8, 9

The Atlantic Refining Co. v. *Federal Trade Commission*, 344 F.2d 599 (C.A.6) 15, 20

United States v. *Arnold Schwinn & Co.*, 1964 CCH Trade Cases Para. 71,329 (N.D.Ill.) 20

United States v. *General Electric Co.*, 272 U.S. 476 12, 13, 19, 21

United States v. *Masonite Corporation*, 316 U.S. 265 2, 13, 17

STATUTES:

Federal Trade Commission Act, 15 U.S.C. 45, Sec. 5 ..2, 22

Title 28, U.S.C. 1254(1) 2

MISCELLANEOUS:

Handler, *Recent Antitrust Developments*, 36 Mich.L. Rev. 59, 61-62 (1964) 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No.

SUN OIL COMPANY, *Petitioner*

v.

FEDERAL TRADE COMMISSION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, the Sun Oil Company, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Federal Trade Commission (J.A. 66-78)[1] is reported at 55 F.T.C. 2071. The opinion of the Court of Appeals (App. *infra*, p. 1a——) is not yet reported.

---

[1] "J.A." refers to the joint appendix certified by the Court of Appeals below. "C.A." refers to the separately bound "Book of Exhibits Received In Camera by the Commission", also certified by the court below. "App." refers to the appendix printed *infra*.

JURISDICTION

The judgment of the Court of Appeals (App. *infra*, p. 26a) was entered on August 19, 1965, and its Final Decree on September 14, 1965 (App. 25a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under *Simpson* v. *Union Oil Company of California*, 377 U.S. 13, and *United States* v. *Masonite Corp.*, 316 U.S. 265, the defensive employment of bona fide consignment agreements with some 24 retail gasoline dealers for the purpose of assisting the dealers to survive and become competitive in an abnormal, unstable marketing area, where the consignment agreements were neither coercively induced nor maintained, violates section 5 of the Federal Trade Commission Act.

2. Whether the Court of Appeals erred in refusing to vacate the Commission's Order because this Court's decision in *Simpson* v. *Union Oil Co. of California*, 377 U.S. 13, should, in such a case as this, be given only prospective application.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, provides in pertinent part:

> Unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

STATEMENT

On November 8, 1957, the Federal Trade Commission (the Commission) issued a complaint (J.A. 1) against Petitioner, Sun Oil Company (Sun), charging that

Sun's use of commission consignment as the method of marketing its branded Sunoco gasoline in the Norfolk, Virginia market area, commencing on November 5, 1956, constituted an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) (the Act). The pertinent facts may be summarized as follows:

a. *The relevant market.* The relevant market involved consists of the metropolitan areas and contiguous territory of the cities of Norfolk, Portsmouth and Virginia Beach, Virginia (the "Norfolk area") (App. 4a). The relevant period of time as alleged and found is November 1956 through April 1959. (App. 5a).

Prior to November 1956, the Norfolk area was and it continued to be, an unstable and an abnormal market. The primary cause of this condition was the presence and competitive impact of an unusually large number of military exchanges (J.A. 40, 181-182, 882-883) which marketed gasolines supplied by such major companies as Texaco, Shell and Esso at prices four to five cents below the prevailing retail prices being posted at competing major brand service stations (App. 5a). Additionally, the market included 21 "private brand" stations, which usually sold gasoline at a price below the major brand prices (App. 5a). Many of these private brand stations had better locations, facilities and services than many of the competing major brand stations, sold either identical gasoline or a product of equal quality, gave coupons and other discount premiums, and enjoyed greater gallonage per station (J.A. 50). These post exchange and private brand stations held an unusually large share of the market (J.A. 40, 948-952).

Because the area for years had been composed of a large transient and lower income population, price was a crucially important competitive factor in the market (J.A. 858, 1101-1102, 249, 377, 453, 792, 1411). Therefore, it was a volatile, unstable market, characterized by frequent and prolonged price wars (J.A. 67, 453, 535, 804, 815-816). And a price disturbance that began in one section of the area would rapidly spread throughout the entire market like a "brush fire" (J.A. 249, 378, 490, 561, 595, 719).

Sun had entered the Norfolk area in 1946, marketing its gasoline exclusively through a wholesale distributor, the Taylor Oil Company, which began operations with but one outlet (J.A. 794). Under Taylor, Sunoco dealer outlets retailed gasoline at prices equal to the lowest prices posted by the private brand dealers (J.A. 757, 799-800, 803, 67-68), and, therefore, Sunoco gasoline had the image of just another private brand. By 1953, the last complete year for which figures are available, Taylor's share of the overall market was approximately 7 percent (J.A. 41). In July of 1954, Taylor supplied 34 stations which sold a volume of 723,275 gallons per month, or an average of 21,272 gallons per station (J.A. 1520, 68). In September of 1954, however, Taylor cancelled his agreement with Sun and became a distributor for a competing supplier (J.A. 121-122, 819-820).

Thereafter, Sun acted as the distributor of its gasolines in the market. It had but 9 outlets and its very modest market share declined substantially from what it had enjoyed under Taylor (J.A. 1521, 41). Sun endeavored to develop acceptance of its gasoline as a major brand, and priced it at wholesale and in a few

company operated stations so as to match prevailing prices of major brands (J.A. 41). Sun was handicapped by the public concept, in this highly price conscious area, that Sunoco was not a major brand product, but rather that its accustomed posted price was the same as the posted price of the unbranded stations and lower than the prevailing major-brand posted prices (J.A. 68, 936, 1004).

Sun attempted to improve its representation in the market by building additional outlets, and it was supplying 29 Sunoco stations by October of 1956. (J.A. 1522). Although it was thus able to increase its overall gallonage between September of 1954 and October of 1956, both its share of the market and its total gallonage were substantially less than it had enjoyed during the years that Taylor distributed Sunoco gasoline. Thus, Sun's share of the total market was 3.85 percent in October of 1956, as compared with the 7 percent it previously had attained under Taylor (J.A. 42). In January-July, 1954, Taylor's last months of operation, Taylor distributed some 4,599,944 gallons (J.A. 1520), while Sun distributed 2,492,935 gallons during the same period in 1956 (J.A. 1522).

The average gallonage per Sun station also remained substantially less than the 21,272 average that had been attained under Taylor. In October, 1956, Sun sold 391,177 gallons through its 29 stations or an average of 13,488 gallons per station (J.A. 68, 1522).

As a result of this declining market position, a number of dealers discontinued their dealerships because they were unable to make a profit, those that were operating were economically unhealthy, it appeared that more dealers would turn back their stations, and Sun

was finding it difficult to persuade people to take over the operation of its vacant stations (J.A. 831-834, 883-884).

This was the state of affairs when, in October, 1956, another price war erupted in the upper Hampton Boulevard area of Norfolk, with 5 major stations (other than Sun) posting a price 3 cents below the previously prevailing price for major gasolines (J.A. 68). Sun's dealers and Sun's volume of sales became further jeopardized and Sun, to meet the latest competitive attack, unilaterally decided to offer all of its dealers in the market area the opportunity to operate as consignee agents with a guaranteed minimum commission per gallon. (J.A. 1455-1458).

(b) *The decision to offer commission consignment.* Sun's leading purpose in offering consignment was to assist its dealers, and itself, to continue in business and become competitive in this market. The immediate problem was the outbreak of the price war on Hampton Boulevard. It was necessary for the Company to provide help, (J.A. 894, 1457), but to have limited assistance to the dealer or dealers proximate to Hampton Boulevard would have siphoned gallonage from Sunoco dealers in other parts of this single market area, for the price war would inevitably spread fast throughout the area, as they did historically, and therefore Sun decided to extend assistance to all dealers in the market area so that no dealer would be hurt or penalized. (J.A. 1457, 165).[2]

---

[2] Sun had a written policy concerning the use of commission consignment (see, *e.g.*, J.A. 1342). The December 27, 1955 policy statement makes it clear that consignment was to be used, as it in fact was here, as a means of assistance to dealers confronted with depressed price conditions. Thus, the statement notes that the

Sun considered other methods for aiding its dealers, but rejected them for business or legal reasons. Thus, assistance by reduction of the tank wagon price was rejected because it would depress the market without benefitting anyone, since the post exchanges and private brands were purchasing their gasolines at a fixed discount below the tank wagon price (J.A. 834)[3] and both the exchanges (J.A. 591, 595-596) and the private brand dealers (J.A. 535-536, C.A. 26-36) received additional discounts during price wars or to meet competition. To reduce the tank wagon price almost automatically would cause those two large segments of the market to receive their supplies at new, lower prices. Further-

---

consignment method of marketing originally was conceived for use in isolated cases, to assist a dealer or a limited number of dealers operating under depressed price conditions. However, the use of the plan expanded to a point where it was installed extensively over some large areas. This resulted from: (a) long-continued depressed price situations in certain parts of Sun's marketing territory, with such conditions sometimes embracing large geographical areas; (b) the resultant continued need to assist dealers in such areas; (c) the failure of tankwagon changes or voluntary allowances to give these dealers effective assistance for any period of time, often due to unusual competitive activities and pricing practices. The statement affirmed the "[belief] that the Commission Consignment Plan under these conditions permits more immediate assistance and more effective assistance to dealers, even though it is more difficult to handle from the Company's standpoint, as to details and accounting" (J.A. 1343).

Consignment, however, was not Sun's principal method of marketing gasoline through the 8900 retail outlets referred to in the Commission's complaint (J.A. 2). Moreover, between August of 1957 and August of 1958, Sun reduced the number of dealers on consignment from 2,195 to 421 (J.A. 869).

[3] The military exchanges purchased gasoline from their suppliers at a fixed discount of 3.69 cents per gallon below the prevailing tankwagon price paid by major brand dealers (J.A. 586, 591), and the private brand dealers received a discount of about 3 cents (C.A. 5-6, J.A. 851-852).

more, the Company's general experience was that neither tank wagon changes nor voluntary price allowances provided effective assistance for dealers in a depressed area (J.A. 1342, 1495-1496). On the other hand, consignment had proved to be a more effective and immediate means of assisting dealers (J.A. 1342, 1496).[4] Finally, Sun decided against tank wagon reductions or competitive price allowances because of the fact that the Commission recently had instituted a proceeding charging that in granting that kind of assistance to a single dealer in Jacksonville, Florida, Sun had illegally discriminated in price against other Sun dealers (J.A. 834, 1496).[5]

---

[4] It should be noted that assistance through tank wagon reductions, or allowances, would have been unfair to the dealers in this volatile area where price moves are frequent and therefore price assistance to dealers would have to take the form of frequent changes in tank wagon prices to meet competition. A dealer who has a full or almost full supply would suffer when a tank wagon price is lowered, while a dealer whose tanks are almost empty would fill them at a lower cost for his gasoline than the cost of the dealer with full tanks. For example, a dealer who purchased a supply of gasoline when the retail price was 27.9 cents and his cost was 23.4 cents would be in an economic and competitive predicament if the retail price thereafter fell to 25.9 cents. Retroactive price adjustments could not restore timely equality and a certainty in the minds of all dealers that they could price their gasoline competitively. Under consignment this kind of unfairness and inequality were avoided. Moreover, retroactive price adjustments would have put Sun in danger of possible charges of price discrimination.

[5] See *Sun Oil Co.* v. *Federal Trade Commission*, 371 U.S. 505. There was, of course, another alternative available to Sun, and that was to vertically integrate by operating its retail outlets in the Norfolk area. At the time that Sun decided to offer consignment to its dealers, it had about 5 company operated stations, and the "trend that seemed to be in motion at that time" was that it would have ended up with more company operated outlets (J.A. 833). Company operation was regarded by Sun as an unsatis-

On November 5, 1956 Sun offered to its dealers in the Norfolk area the opportunity to become commission merchants to sell Sun's gasoline. Sun's local manager, Southard, held a series of three meetings, attended by different groups of dealers, at which he explained the operation of consignment selling and the reasons for its offer (J.A. 164-165, 1457). The dealers were informed that they were free to reject the plan (J.A. 175-176, 285, 374, 718). As dealer Helth, a Commission witness, acknowledged (J.A. 285):

> A. Well, my busines at the time of that meeting wasn't very good. And I was contemplating going out of business. And I didn't feel that I could stay in business and operate on my own setting my own price and buying at the regular tankwagon price.
>
> And at the end of the meeting I started thinking that maybe this would be my salvation.
>
> So in accordance with everyone else I signed up.
>
> * * *
>
> Q. Well, you weren't compelled to sign this agreement, were you?
>
> A. Oh, no, it was strictly of the dealer's own volition.

All except one dealer accepted the plan (J.A. 406). The sole exception did not properly understand it and he later executed a consignment contract (J.A. 423-424).

---

factory alternative, and instead it sought to make the operations of its dealers more profitable (*Ibid*). The need to survive and be competitive in unstable markets and/or during price wars eventually may outweigh the "apparently persuasive reasons for heretofore rejecting direct ownership and operation of their stations . . . ." *Sun Oil Co.* v. *Federal Trade Commission*, 371 U.S. 505, at 529-530.

(c) *The operation of consignment.* Under the consignment plan Sun and any dealer wishing to take advantage of it entered into an Amendment to the dealer's purchase agreement whereby all provisions of the agreement relating to the purchase and sale of motor fuel were suspended. Sun agreed to deliver gasoline to which it expressly retained title, and all proceeds of sale were Sun's property and were to be segregated from the Agent's other funds. The agent was required to sell at the price designated by Sun, to be responsible for the consigned stock, to keep such records as Sun might require, and to account to Sun and deliver the proceeds of sale, less commissions, at such times as Sun might require.

At the inception of the consignment plan, Sun purchased the gasoline then in the dealers' tanks, giving them credit for the value thereof. (J.A. 249-250, 491, 716, 1349, 1588). Thereafter, the agents accounted to Sun for the amount of gasoline actually sold (J.A. 246, 335, 376). Every time Sun made a change in the retail price, the amount of gasoline in each agent's tanks was measured, and the amount sold at each price was accounted for. (J.A. 261, 377, 448, 716-717). Whenever consignment was initiated at any station in any market area, Sun's Tax Department in Philadelphia was notified and it was their duty to obtain any necessary retail licenses in the name of the Company. Initially, through inadvertence, they failed to take this step in Norfolk, but when it was called to their attention by the Norfolk Commissioner of Revenue the error was promptly rectified and taxes were paid (J.A. 736-737).

The minimum commission payable to the dealers in the Norfolk market area initially was 4.5 cents per

gallon (J.A. 1457), but it was increased to 5.25 cents by January of 1957 (J.A. 212-213), and no lower commission was paid in the area after January 14, 1957 (See Commission Exhibit 93, at J.A. 1538 *ff*). At such times as the retail price approximated the price prevailing prior to consignment, the commission increased to approximately the margin the dealers previously had enjoyed (J.A. 243, 216-217). Moreover, under consignment Sun was able to be competitive and meet the lower price war prices of competing companies without penalizing its dealers. It periodically reduced the retail price of consignment gasoline in order to respond to reduced prices which previously had been posted by other major and private brand stations (J.A. 1620 *ff*.). Moreover, when it reduced its price below 24.8 cents, the amount that the dealers paid Sun for the gasoline prior to the price war, the dealer-agents nevertheless received the minimum commission of 4.5 cents and later 5.25 cents.[6]

---

[6] As noted before, the dealer most proximate to the area where the price disturbance erupted earned a margin of 6.1 cents on a retail posting of 30.9 cents before the outbreak of the price war (J.A. 1455). However, if he and other Sunoco dealers had not accepted assistance from Sun through consignment and had attempted to meet the initial price war posting of 27.9 cents, the gross profit would have dropped to 3.1 cents (J.A. 893-894, 1455). Similarly, since the cost of the gasoline to the dealers (tank wagon price) was 24.8 cents (J.A. 424), they would have earned 1/10 cents per gallon when the retail price dropped to 24.9 cents on November 15, 1956 (J.A. 1539). Yet, under consignment they earned at least 4.5 cents before January 14, 1957 (J.A. 1539-1540), and at least 5.25 cents thereafter at postings of 24.9 cents and lower. On the other hand, when the retail price fell to 24.9 cents, Sun was retailing its gas at 1/10 cents above the price that it had been charging its dealers prior to the offer of consignment. Yet, from that amount Sun had to pay its dealers the minimum commission, and commission consignment administratively was a more

(d) *The decisions below.* The Commission held that Sun's use of consignment was illegal, "not because it did not constitute a genuine consignment under the law of agency", but because the proof showed it to be a vertical and horizontal price fixing device (J.A. 75) This conclusion was based on the fact that the consignment contracts were not separately and individually negotiated with each dealer. Rather, the Commission reasoned, the dealers were called together in groups, and at these meetings "the dealers among themselves and in each other's physical presence could and did pledge to fix prices horizontally; Sun, in the presence of the dealers, pledged to fix prices vertically" (J.A. 73). The Commission distinguish *United States* v. *General Electric Co.*, 272 U.S. 476, where this Court sustained the validity of a comprehensive consignment program against a charge that the agreements constituted a device for price fixing, on the ground that Sun, unlike General Electric, "did not content itself with unilateral vertical arrangements but instead joined with its dealers in horizontal arrangements which wiped out any slight opportunity for independent market action through price variances of any of its retail dealers" (J.A. 73).

The court below, in affirming, noted that the Commission had found that two price fixing conspiracies

---

expensive and cumbersome method of marketing for the company (J.A. 199, 1343).

Under consignment the dealers received a commission of 5.9 cents at a retail posting of 30.9 cents after January 14, 1957, or 2/10 cents less than they did before consignment, an insignficant difference. At postings of 29.9 cents and 28.9 cents, they received a greater income under consignment, or 5.7 cents as compared to 5.1 cents, and 5.5 cents as compared to 4.1 cents (See, generally, Commission Exhibit 93, J.A. 1540 *et seq.*). Thus, consignment in fact did financially assist the dealers.

existed—a horizontal one among all the dealers accepting consignment, and a vertical one between Sun and each of the dealers accepting consignment. It is significant that the court stated that the "horizontal" conspiracy was inferred from the pattern of price fixing disclosed in the record, and it concluded that there was adequate foundation for *such* a finding by the Commission.[7] It agreed with the Commission that the instant case was distinguishable from *United States* v. *General Electric Co.*, 272 U.S. 476, on the ground that this case involved horizontal as well as vertical price control. In express reliance upon *United States* v. *Masonite Corporation*, 316 U.S. 265, and *Simpson* v. *Union Oil Co. of California*, 377 U.S. 13, the Court of Appeals held that "where a commission consignment plan such as this, otherwise valid as measured by the law of agency, and even though not coercively induced, results in horizontal as well as vertical price control, such consignment plan constitutes an illegal price fixing device and an unfair method of competition and unfair practice in violation of the Federal Trade Commission Act. Such a commission consignment plan as we have here we find to be *illegal per se*, for its evil—like the plan condemned in *Simpson*—'is its inexorable potentiality for and even certainty in destroying competition in retail sales of gasoline by . . . 'consignees' who are in reality small struggling competitors seeking retail gas customers.' 377 U.S. at 21." (Emphasis supplied). (App. 22a).

---

[7] That the dealers were called in to meetings in groups does not appear to be the basis of the finding of a horizontal conspiracy.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals erred in holding that Sun's use of a non-coercive commission consignment program of the dimensions involved here constitutes an illegal price fixing device under the Federal Trade Commission Act. The valid retention of title to gasoline by Sun is unquestioned in this case. The antitrust laws do not expressly prohibit the owner of goods generally from determining the price at which they will be sold by bona fide agents. This Court in *Simpson* v. *Union Oil Co. of California,* 377 U.S. 13, has found such a prohibition under the circumstances of that case. But the court below went beyond the antitrust laws and this Court's decision in *Simpson.* Commission consignment is an ancient and widely used method of marketing, and consignment by itself is not a *per se* violation of the antitrust laws. It was error to give extension to *Simpson* and hold that Sun's non-coercive employment of consignment as a means of assisting its dealers to survive a situation of competitive necessity in a small, abnormal market area, was prohibited.

The consignment agreements involved here are distinguishable, in purpose and effect, from the consignment program held illegal in *Simpson* v. *Union Oil Co. of California,* 377 U.S. 13, one of the cases principally relied on by the court below. In *Simpson,* this Court concluded that: (1) The consignment arrangement was coercive; (2) It was Union's only method of distribution; (3) Use of consignment in marketing of gasoline, the Court stated, is for resale price maintenance; and (4) The evil of the program of Union Oil was its potentiality for and certainty in destroying

completion by the consignees, who are small, struggling, retail dealers.

Here, however, neither Court of Appeals nor the Commission concluded that Sun's program was coercively induced.[8] Moreover, the consignment program here does not embrace a vast distribution system. Sun offered consignment to the fewer than 30 dealers in the small, abnormal market area because of the competitive circumstances which existed there. Additionally, unlike Union, Sun did not adopt consignment as its exclusive method of marketing, but largely sold to dealers in its total market area for resale. Indeed, consignment was not even mandatory in the Norfolk area, and a dealer who originally accepted consignment could thereafter terminate the arrangement on five days' notice (J.A. 1186). Even when prices and commissions went up dealers did not elect to go back to the former method of purchase and resale.

Furthermore, Sun did not introduce consignment into a normal market as a device for price fixing. Rather, Sun was impelled to offer consignment defensively to meet a situation of dire competitive neces-

---

[8] The court below pointed out that: "With regard to coercion, the Commission merely found that 'a combination or conspiracy was instituted even though dealers were not uniformly desirous of entering into the arrangement proposed by the respondent.' The word 'coercion' is not even present in the Commission's opinion." (App. 21a). Both the Commission and the court below took the present case to be different from *The Atlantic Refining Co.* v. *Federal Trade Commission*, 344 F.2d 599 (C.A. 6). That case is now before this Court on petition for certiorari (No. 558, October Term, 1965) and in the brief for the Federal Trade Commission In Opposition it appears to be conceded that neither the Seventh Circuit Court of Appeals nor the Commission made a finding that Sun *had* employed coercion. (p. 6n).

sity. First, its share of the market, always relatively insignificant, and its gallonage per station had declined substantially; a number of dealers had turned back their stations because they were unable to make a profit; and those that were operating were economically unhealthy (J.A. 833, 883). Second, the situation confronting the dealers became more serious with the outbreak of the price war in October 1956, which threatened a prolonged period of price instability and reduced profit margins for Sun's beleaguered dealers. To continue in business, these dealers had to meet the depressed price war prices. Sun's purpose in introducing consignment was to preserve inter-brand competition by assisting its dealers and itself through assumption of the burdens of marketing direct to the motoring public while guaranteeing the dealers at least a minimum income per gallon regardless of how low the retail prices fell.

Contrary to the view of the court below (App. 21a), this case is distinguishable from *Simpson* because the use of consignment did not have an "inexorable potentiality for and even certainty in" destroying competition by Sun dealers for retail customers. The problem that existed in this market was that Sun dealers were being destroyed by the competition of other brands. Their continued destruction would reduce intra-brand as well as inter-brand competition. Consignment, in part, was Sun's method of financially helping the dealers during the struggle to obtain and hold customers. Further, unlike Union Oil, Sun did not impose non-competitive prices on its dealers but actually engaged in effective interbrand competition after the adoption of consignment. The record (J.A. 1620 *ff.*) establishes that Sun reduced the retail prices

at its various stations in different sections of the market in order to be competitive with the lower prices as they were posted at competing outlets. For example, on June 21, 1957, the retail price of Sunoco in the Portsmouth-Sleepy Hole segment of the market was reduced from 27.9¢ to 23.9¢ because four other major companies had previously posted that price. (J.A. 1625). The dealers received the minimum commission (5.25¢ per gallon) even though the retail price of the gasoline was lower than what the gasoline cost the dealers (24.8¢) prior to the outbreak of the price war. As one Sunoco dealer put it: "Well, the way the price fluctuates and everything, the consignment plan is actually a little better. It gives me a chance to meet competition, and it is not as expensive to me as it could be otherwise." (J.A. 243)

The court below held, however, that the consignment agreements were illegal because they resulted in "horizontal as well as vertical price control" (App. 16a). The court's reliance upon *United States* v. *Masonite Corporation,* 316 U.S. 265, is misplaced. In *Masonite,* this Court was not concerned with the question of validity of consignment agreements between a supplier and its distributors, but it was presented with a horizontal conspiracy between suppliers of competing products to fix prices through the device of commission consignment. *Masonite* would be relevant if Sun had appointed a group of competing oil companies as its consignee-agents to sell Sunoco gasoline at prices fixed by Sun. The distinction between such a combination of competitors and the consignment adopted here is of great practical significance in the market place. Under the former, "whole industries could be knit together so as to regulate prices and suppress com-

petition" (316 U.S. at 278); under the latter, as the record in this case discloses, competition continues and flourishes.

Moreover, the Commission's conclusion, affirmed by the court below, that the dealers entered into "at least a tacit" (J.A. 74) horizontal agreement with respect to the fixing of retail prices, was predicated on the fact that Sun offered consignment at meetings attended by several dealers, rather than negotiating the contracts separately and individually with each dealer. Because the Sun official at those meetings advised the dealers that under consignment Sun would have the right to determine the retail price, and that it might be necessary for Sun to price its gasolines more competitively with the post exchange and private brands, the Commission ruled that the dealers entered into a horizontal conspiracy when they accepted consignment. Taking the opinion of the Court of Appeals to have adopted this thesis, the question is at once raised whether a supplier may ever offer consignment to more than one distributor in a competitive market area as a means of assistance.[9] This is a question which was not discussed in Simpson and which is of large importance. In order to make such an offer, the supplier would have to approach each distributor and discuss price with him. Thus, the sup-

[9] *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 226-227, is not in point. The Court there stated that "Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act". Here, however, neither the purpose, the necessary consequence, nor the actual effect of Sun's use of this broadly used method of marketing was an unreasonable restraint of trade.

plier would have to inform the distributor that under consignment it would have the right to determine the retail price of the product. The supplier would at least have to explain its intended general pricing policy. Candor also would require the supplier to explain to each distributor that the same offer and discussion with respect to price was being made to other outlets. Under the reasoning of the decisions below, the dealers accepting the offer could be found to have joined a horizontal conspiracy with respect to retail prices since, as here, they acted after a discussion as to what the retail pricing policy of the consignor would be and with knowledge that the same offer was being made to other distributors. There would, therefore, be no way for a supplier to safely offer consignment to more than one distributor in a market area, no matter what the competitive circumstances might be.

2. The questions presented by this case are of substantial and continuing importance. As this Court recognized, "Consignments perform an important function in trade and commerce, and their integrity has been recognized by many courts, including this one, *Simpson* v. *Union Oil Co. of California,* 377 U.S. 13, 17. Moreover, consignment is extensively employed throughout the economy on both the retail and wholesale levels. See *Simpson* v. *Union Oil Co. of California,* 377 U.S. at 30 (dissenting opinion); Handler, *Recent Antitrust Developments,* 63 Mich. L. Rev. 59, 61-62 (1964). The question whether this time-honored method of marketing violates the Sherman or Federal Trade Commission Act, therefore, is of wide interest and importance.

At least since this Court's decision in *United States* v. *General Electric Co.,* 272 U.S. 476, it has been be-

lieved that genuine consignment agreements do not constitute devices for price fixing within the meaning of the antitrust laws, "however comprehensive as a mass or whole in their effect" 272 U.S. at 488. In *Simpson,* however, this Court ruled that consignment could not be coercively imposed to cover a vast distribution system if used as a device for price fixing. As a result of that decision, there is a substantial question as to when and how consignment may be used in other circumstances. This case provides an appropriate record for clarifying the reach of *Simpson* and the conditions under which the consignment method of distribution may be used. For, the instant case differs in every material respect from *Simpson,* as noted above. Whether consignment which is not coercively induced can be used as a means of assistance for distributors, as it was here, is a question of recurring importance. *Cf. Snap-on-Tools* v. *Federal Trade Commission,* 321 F. 2d 825, 829 (C.A. 7) (consignment used during the initial stages of a dealer's franchise by way of financial assistance); *United States* v. *Arnold Schwinn & Co.,* 1964 CCH Trade Cases Para. 71,329 (N.D. Ill.) (distributors needed help in carrying adequate stocks of the consigned products); *C.B.S. Business Equipment Corp.* v. *Underwood Corp.,* 1964 CCH Trade Cases Para. 71,341 (S.D.N.Y.), 144 U.S.P.Q. 302;[10] *The Atlantic Refining*

[10] As was the case with the court below, the court in *Underwood* was unwilling to believe that *Simpson* constitutes a holding that consignment is *per se* illegal. It preferred to let *Simpson* stand on its own facts and reserved decision on any other consignment agreement until all pertinent facts are established. The court stated that there are persuasive reasons to justify consignment distribution, as to which it made no finding, but calling attention to estimates that the average dealer needed assistance.

Co. v. *Federal Trade Commission*, 344 F. 2d 599 (C.A. 6) certiorari pending in this Court (legality of commission consignment distribution of gasoline); *Lyons* v. *Westinghouse Electric Corp.*, 235 F. Supp. 526 (S.D.N.Y. 1964); *Guidry* v. *Continental Oil Co.*, No. 21543, 5th Cir., July 2, 1965. 1965 CCH Trade Cas. Para. 71,495.

3. The questions presented by this case are of special importance to the structure of the retail gasoline industry. Consignment was offered here to assist dealers during a situation of competitive necessity. Other methods of aiding the dealers were rejected either because they were not regarded as effective or because they involved a serious danger of a price discrimination action. See *supra*, pp. 7, 8. If the use of consignment as a means of dealer assistance also is under all circumstances unavailable to an oil company, then there will be no practical lawful means of assisting dealers experiencing severe financial difficulties in a large number of markets, and the suppliers must then undertake to vertically integrate and company-operate their retail outlets. Consignment was offered here to halt "the trend that seemed to be in motion at the time"—company operation (J.A. 833). Because that course of action now confronts this industry, we submit that it is important for the Court to resolve the question whether consignment may be used without coercion and as a defensive means of assisting a limited number of dealers during a situation of competitive necessity.

4. The petitioner structured its agency system upon the well established authority of this Court's decision in *United States* v. *General Electric Co.*, 272 U.S. 476

(1926). This it was entitled to do and to rely upon that decision as justifying the use of veritable consignment. In the court below petitioner argued, with out effect, that within the rationale of this Court's action in giving only prospective effect to its decision in *Simpson,* a cease and desist order would be inappropriate if the court below should apply the *Simpson* decision to this case. (Reply Br. p. 5).

Basic considerations of fairness and equity make it appropriate for this Court to review the result here of retrospective application of *Simpson.* The cease and desist order, while prospective, nevertheless works a punishment for past conduct, conduct here taken in good faith, through an order much broader in terms than consignment, and which runs in perpetuity.[11]

---

[11] Questions of fairness and equity arise from the provisions of the order directing petitioner to cease and desist from:

1. Entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, arrangement, agreement, contract or conspiracy with any person or persons not parties hereto, to establish, fix, adopt, maintain, adhere to, or stabilize by any means or method, prices, terms or conditions of sale at which its gasoline is to be sold.

2. Establishing, maintaining, continuing, cooperating in, or carrying out, or attempting so to do, any plan, policy, program, or any consignment policy in combination with any other person or persons not parties hereto, for the purpose or with the effect of enabling respondent to establish or fix the prices, terms or conditions of sale at which its gasoline is to be resold by a dealer after purchase from respondent.

Provided, However, that nothing herein contained shall be construed to limit or otherwise affect any resale price maintenance contracts which respondent may enter into in conformity with Section 5 of the Federal Trade Commission Act, as amended by the McGuire Act (Public Law 542, 82nd Cong., 2nd Session, approved July 14, 1952).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

LEONARD J. EMMERGLICK
1021 Tower Building
Washington, D. C.
Attorney for Petitioner

Of Counsel:

HENRY A. FRYE
SAMUEL K. WHITE
RICHARD L. FREEMAN
Fidelity-Philadelphia
Trust Building
Philadelphia, Pa.

PEPPER, HAMILTON & SCHEETZ
Fidelity-Philadelphia
Trust Building
Philadelphia, Pa.

November, 1965